KOPERASI BELIA NASIONAL BHD

v.

STORAGE ENTERPRISE (PORT KELANG) SDN BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-633-1995]
20 MAY 1998

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Filing and service of application to set aside - Whether must be filed and served within thirty days of receipt of order or judgment - Rules of the High Court 1980, O. 42 r. 13*

CIVIL PROCEDURE: *Res judicata - Conditions for application of doctrine - Absence of adjudication - Whether doctrine applicable*

The appellant had sought to set aside an *ex parte* order which the High Court had granted to the respondent on account of its absence at the hearing of the suit. The facts showed that the sealed copy of the order was served on the appellant on 3 February 1994. By O. 42 r. 13 Rules of the High Court 1980 ('the RHC'), the appellant must file and serve the application to set aside not later than thirty days from 3 February 1994, the date it received the sealed copy of the order. For reasons unclear, however, the appellant had only served the application to set aside on the respondent on 28 March 1994, after having filed the same on 2 March 1994. Low Hop Bing J held that the appellant's application had been made outside the time permitted under O. 42 r. 13 of the RHC and so dismissed the application with costs. Hence this appeal.

Held:
Per NH Chan, Abu Mansor Ali & Abdul Malek Ahmad JJCA

[1] Order 42 r. 13 of the RHC specifically states that where provisions are made in the RHC for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him. That being so, there was no reason for this court to disagree with the learned judge below.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Perayu berhasrat untuk mengetepikan satu perintah *ex parte* yang diberikan kepada responden setelah perayu gagal hadir di pendengaran kes. Fakta menunjukkan bahawa salinan perintah-perintah yang dimeterai tersebut telah diserahkan kepada perayu pada 3 Februari 1994. Berdasarkan A. 42 k. 13 Kaedah-kaedah Mahkamah Tinggi 1980, perayu hendaklah memfail dan menyerahkan permohonan untuk pengenepiannya itu tidak melebihi tiga puluh hari dari 3 Februari 1994, tarikh ia menerima perintah yang dimeterai berkenaan. Bagaimanapun, atas alasan yang kurang jelas, perayu hanya menyerahkan permohonan untuk pengenepiannya tersebut ke atas responden pada 28 Mac 1994, setelah memfailkannya pada 2 Mac 1994. Low Hop Bing H memutuskan bahawa permohonan perayu telah dibuat diluar masa yang dibenarkan di bawah A. 42 k. 13 dan dengan itu menolak permohonan dengan kos. Perayu merayu.

Diputuskan:
Oleh NH Chan, Abu Mansor Ali & Abdul Malek Ahmad HHMR

[1] Aturan 42 k. 13 Kaedah-kaedah Mahkamah Tinggi 1980 secara khusus menyatakan bahawa di mana terdapat peruntukan dalam Kaedah untuk pengenepian atau pemindaan sesuatu perintah atau keputusan, pihak yang berhasrat untuk mengketepi atau meminda perintah atau keputusan berkenaan mestilah membuat permohonan kepada mahkamah dan menyerahkan permohonan tersebut kepada pihak yang memperolehi perintah atau keputusan dalam masa tiga puluh hari selepas penerimaan olehnya akan perintah atau keputusan tersebut. Oleh kerana itulah kedudukannya, maka tiada sebab bagi mahkamah ini untuk tidak bersetuju dengan hakim yang bijaksana di bawah.

[Rayuan ditolak.]

Case referred to:
Tong Lee Hua v. Lee Yoke San [1981] 1 MLJ 54 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 42 rr. 10(5), 13

For the appellant - JT Sambanthan (Sheela Naraiyanansamy with him); M/s Nashir, Johal & Co
For the respondent - Muhammad Shafee Abdullah (WW Cheong, Jahaberdeen & Mohamed Yunoos with him); M/s Shafee & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D2-31-190-87]

Reported by WA Sharif

JUDGMENT

NH Chan JCA:

On 6 December 1993, Siti Norma Yaakob J (as she was then) made an order in chambers *ex parte* striking out the defence of the defendant (appellant) and gave judgment for the plaintiff on its statement of claim. Counsel for the defendant did not appear before the judge on that day because, according to him, his clerk had omitted to record the date in his diary.

On 3 February 1994 the plaintiff (the respondent in this appeal) served a sealed copy of the judgment on the defendant.

On 2 March 1994, the defendant filed an application to have the *ex parte* judgment of Siti Norma Yaakob J set aside, but the application was only served on the plaintiff on 28 March 1994. Order 42 r. 13 of the Rules of the High Court states that the defendant, and I quote, "must make his application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him." Richard Talalla J however rejected the objection of the plaintiff taken under O. 42 r. 13 and adjourned the hearing of the summons in chambers to set aside the judgment. This is what he said:

> The Order to be served must be an Order of the Court. A draft order is not an Order of the Court. An Order of the Court must necessarily be an Order duly drawn up, produced, passed and sealed as required by O. 42 r. 10(5) of the RHC 1980, for the purpose of O. 42 r. 13.

Eventually the hearing of the matter came up before Low Hop Bing J who heard it *de novo*. He dismissed the application by the defendant to set aside the judgment of Siti Norma Yaacob J. Hence this appeal by the defendant.

The appellant's case is that Richard Talalla J had already adjudicated on the point concerning O. 42 r. 13 and therefore it is *res judicata.* Counsel for the appellant argued that Low Hop Bing J should not have heard the matter *de novo* and dismissed the appellant's application.

Nothing could be clearer than that Richard Talalla J made no adjudication on the point that the application to set aside Siti Norma Yaacob J's judgment was served out of time. All that Richard Talalla J found was that the judgment of Siti Norma Yaakob J that was served on the defendant has to be a sealed copy. In fact, it was a sealed copy of the judgment that the defendant received from the plaintiff on 3 February 1994. The judge did not make any adjudication on the point under O. 42 r. 13 which was that the defendant's application to set aside the judgment was served on the plaintiff more than thirty days after the defendant had received the sealed judgment of Siti Norma Yaakob J.

When the judge in the earlier proceedings made no adjudication, the plea of *res judicata* must fail; see *Tong Lee Hua v. Lee Yoke San* [1981] 1 MLJ 54, PC.

The sealed *ex parte* judgment of Siti Norma Yaacob J was served on the defendant on 3 February 1994. Order 42 r. 13 requires that the defendant's application to set aside that judgment must be filed and served on the plaintiff within thirty days of the receipt of the sealed judgment. The application of the defendant to the court to have the judgment set aside was served on the plaintiff on 28 March 1994 which was more than thirty days from 3 February 1994, ie, the date of the receipt of the sealed judgment of Siti Norma Yaakob J. Low Hop Bing J was right in holding that the defendant's application did not comply with O. 42 r. 13. It was served on the plaintiff outside the time allowed to make and serve the application.

We were unanimous in dismissing the appeal with costs.

Abu Mansor Ali JCA:

The appellant/defendant appeals against our decision given on 24 September 1997 dismissing its appeal against the decision of the learned trial judge in the court below given on 12 September 1995 dismissing its application to set aside an *ex parte* order dated 6 December 1993 striking out the appellant's statement of defence and thereafter granting the respondent/plaintiff the declaration as prayed in its originating summons dated 10 July 1987 and costs.

The short issue raised by this appeal is whether the court below had correctly applied its discretion to dismiss the appellant's application to set aside the judge's *ex parte* Order dated 6 December 1993 when it was affected by undue delay.

We upheld the contention of the respondent's counsel that the appellant's application to set aside the *ex parte* Order dated 6 December 1993 contravened O. 42 r. 13 of the Rules of the High Court 1980 (hereinafter "the Rules") which states:

> 13. Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

As has been stated the judge's Order striking out the defence and granting the prayers sought was dated 6 December 1993 (pp. 56-58 of the Appeal Record).

The appellant filed an application, on 2 March 1994, to set aside the order of 6 December 1993 appearing in encl. (53) as follows:

> Benarkan semua pihak yang berkenaan hadir di hadapan Hakim dalam kamar pada 6hb April, 1994 pukul 9.00 pagi bagi mendengarkan permohonan oleh pihak Defendan untuk Perintah-Perintah berikut:
>
> 1. Bahawa Perintah yang diberi pada 6hb Disember, 1993 untuk membatalkan pembelaan dan penghakiman dimasukan terhadap Defendan diketepikan.
>
> 2. Bahawa Defendan dibenarkan untuk memfailkan permohonan ini diluar jangka masa yang ditetapkan.
>
> 3. Kos dijadikan kos dalam kausa.

When translated reads:

> Let all parties concerned attend before the Judge in Chambers on the 6th day of April 1994 at 9.00 a.m. on the hearing of an application on the part of the defendant for the following orders:
>
> 1. That the Order made on the 6th December 1993 annulling the defendant's defence and giving judgment against the defendant be set aside.
>
> 2. That the defendant be allowed to file this application out of time and
>
> 3. That the costs in this matter be cost in the cause.

In chambers before Richard Talalla J on 6 April 1994, En. Balaguru for the appellant pointed out to the judge that encl. (53) was filed on 2 March 1994. It was issued out of the registry on 22 March 1994 and it was served on 28 March 1994.

The case was, according to p. 61 of the Appeal Record, adjourned to 19 May 1994 and adjourned again to 28 May 1994.

On 28 May 1994 because Mr. Balaguru for the appellant was unwell it was adjourned to 6 June 1994 but from p. 62 of the Appeal Record it was the judge who on his own motion seemed to have brought to the attention of the parties the provision of O. 42 r. 13 of the Rules. On that date, Mr. Jahaberdeen, counsel for the respondent raised an objection under O. 42 r. 13 of the Rules that the appellant must make his application to set aside the judgment within 30 days after the receipt of the order. The draft order was served on the appellant by the respondent on 16 December 1993. The application, encl. (53), was only made on 2 March 1994.

Richard Talalla J found as follows, at p. 64 of the Appeal Record:

> Judge: I refer to the first preliminary objection. The Order to be served must be an Order of the Court. A draft order is not an Order of the Court. An Order of the Court must necessarily be an Order duly drawn up, produced, passed and sealed as required by O. 42 r. 10(5) of the RHC 1980, for the purpose of O. 42 r. 13.

It is clear from his judgment that a sealed order must be served and he upheld the first preliminary objection of the respondent's counsel.

In this appeal before us the respondent's counsel En. Shafee Abdullah submitted further, which was not disputed, that there was no application for extension of time to serve the application out of time.

It is abundantly clear to us that the filing of the application was out of time by a month since the application was only served on 28 March 1994.

On the same day, 6 June 1994, Richard Talalla J also ruled on the second preliminary point as follows (p. 65 of the Appeal Record):

> As to the second preliminary point I cannot rule on it until I have heard the application on the merits. It is only after hearing the application on the merits that I will be able to ascertain and determine whether the affidavit in support offends either in whole or in part the provisions of O. 42 r. 5 and the case law.

The judge was somehow prevented by his illness from completing and giving judgment on this second preliminary point until this matter was heard *de novo*, apparently with the tacit consent of parties, by Low Hop Bing J on 15 August 1995 (see p. 68 Record of Appeal) who opted and requested parties to submit written submissions and fixed 12 September 1995 for decision.

On 12 September 1995 Low Hop Bing J held that the absence of counsel on 6 December 1993 was due to the mistake of the clerk in not recording the date down and that that was no excuse for counsel's absence. There was also absence of any explanation for the delay in not filing the application on time thus contravening the 30 day period. For these reasons, he dismissed the application to set aside the order of 6 December 1993.

We have considered counsel's arguments and could find no reason for interfering with the decision given by the court below in dismissing the application. We dismissed the appeal with costs.

Abdul Malek Ahmad JCA:

Order 42 r. 13 of the Rules of the High Court 1980 (hereinafter "the Rules") specifically states that where provisions are made in the Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

On 6 December 1993, Siti Norma Yaakob J (as she then was) struck out the statement of defence of the appellant (the defendant) and gave judgment for the respondent who was the plaintiff in the court below. Learned counsel for the appellant was absent due to his clerk omitting to record the hearing date in the relevant diary.

The sealed copy of the order was served on the appellant on 3 February 1994. On 2 March 1994, the application to have that *ex parte* order set aside was filed by the appellant but it was served on the respondent only on 28 March 1994.

It was the contention of learned counsel for the respondent that the application to set aside the *ex parte* order did not comply with O. 42 r. 13 of the Rules as the appellant had taken more than thirty days after the receipt of the order or judgment to file the application and serve it on the respondent.

The preliminary objection taken before Richard Talalla, J was on this point but he instead held that the order served must be "an order duly drawn up, produced, passed and sealed as required by O. 42 r. 10(5) of the RHC 1980, for the purpose of O. 42 r. 13" and not just a draft order as in this case. Actually, he was clearly in error as the order served on 3 February 1994 was indeed the sealed order of the court as the draft order had in fact been served earlier on 16 December 1993.

Learned counsel for the appellant submitted that it was wrong for the matter to be heard *de novo* before another judge but it is our view that Richard Talalla, J did not hear the matter on the merits. This is made clear by the notes of evidence where he said:

> As to the second preliminary point I cannot rule on it until I have heard the application on the merits. It is only after hearing the application on the merits that I will be able to ascertain and determine whether the affidavit in support offends either in whole or in part the provisions of O. 42 r. 5 and the case law.

The principles of *res judicata*, therefore, cannot apply.

The matter was eventually heard by Low Hop Bing, J who held that the appellant's application had been made outside the time permitted under O. 42 r. 13 of the Rules and dismissed it with costs. For the considerations stated, we saw no reason to disagree with him and accordingly dismissed the appeal with costs.